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AN

ADDRESS

TO THE

WHIG CLUB, &c.

1790

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A D D R E S S

TO THE

WHIG-CLUB, &c.

AN

ADDRESS

TO THE

WHIG CLUB:

WITH

AN ESSAY

ON THE

JUDICIAL DISCRETION OF JUDGES,

ON

FIATS AND ON BAIL.

"And they do claim, demand, and insist upon all and singular the premises, as their undoubted rights and liberties, and that no declarations, judgments, doings, or proceedings, to the prejudice of the people in any of the said premises, ought in any wise to be drawn hereafter into consequence or example."

BILL OF RIGHTS.

DUBLIN:

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M DCC XC.

AN

ADDRESS

TO THE

WHIG CLUB.

IN your integrity and abilities the people confide for protection, juſtice, and redreſs. Upon the principles on which you have aſſociated, they reſt their hopes. They expect from your virtue, ſpirit, and perſeverance, not only the preſervation of their rights, lately reſcued from an uſurped and foreign controul, but the perfection of their further claims, by removing that corruption which has contaminated every department of the State; which has tainted even the moſt ſubordinate offices, which has encreaſed and

is encreaſing under the dictates of the Britiſh Miniſter, for the evident purpoſe of repelling the generous energies of liberty.

Next to the law of religion, the law of the land ſhould be the principal ſtudy with a free people. A knowledge of the one being as eſſential to their temporal intereſts as a knowledge of the other is to their eternal happineſs. Wilful ignorance will neither excuſe the ſoul before the tribunal of the creator, nor the perſon before the judgment ſeat of the conſtitution. To diffuſe legal information is the purpoſe of this eſſay: it is not written to acquire fame—It is written to meet the approbation of the underſtanding, not to amuſe the fancy, and you will attend to it, from reſpect to the ſubject on which it treats.

It is not in ornaments that the merit of an argument conſiſts. In viewing a portrait, the figure and features are the principal objects of contemplation; nor can the moſt elegant drapery, or beautiful colouring pleaſe the minds eye, where the artiſt deviates

viates from nature and truth. The intent will excuſe in your minds, the blemiſhes of the performance. The opinions, if not expreſſed, are conceived in the ardor of patriotiſm; in diſintereſted love for a community, where the writer received that life, which he thinks can only be well ſpent in its ſervice.

The writer ſhould conſider himſelf puſillanimous, and contemptible indeed, if in the preſent conteſt between the friends of his country, and the purchaſed dependants of the Britiſh miniſter, he withheld the little contribution of knowledge, that his ſtudies have afforded him. This is an æra, where every honeſt hand, every honeſt heart, and every honeſt head, ſhould unite their exertions, and with "a long pull, a ſtrong pull, and a pull all together," level to the earth that rotten fabric, where deſpotiſm holds private counſel with corruption, for the treacherous purpoſe of ſapping, and overturning the nobleſt conſtitution that wiſdom ever framed, or freedom ever defended.

The authority delegated by the people to their repreſentatives in parliament, has now reverted to its original poſſeſſors. This then is the time, they ſhould be informed how that truſt has been executed, that they may know who has deſerved their approbation, who has merited their cenſure and reſentment.

Meaſures militating with the liberty of the ſubject, have been carried into effect by venal majorities. Every propoſition brought forward to diminiſh undue influence, to eſtabliſh œcomy, to ſecure the revenue, to vindicate the law, and to eaſe the people, have been negatived by the ſame correct power. Oppreſſion has experienced impunity, the injured have been denied redreſs, and the authority of law and ſound reaſon, has been trampled upon by the aggregate force of numbers. This then is the time when conſtitutional knowledge ſhould be deſeminated through the land, when the principles of legiſlation and law ſhould be made known to the people at large.

This

This is the time when men, who regard the intereſts of their country, who are not equally inſenſible to the value of their own honour, and the good of poſterity, following the glorious example of your aſſociation, ſhould with all their powers, promote the ſpirit of liberty, till every heart pervaded by that divine eſſence, which expands the underſtanding, and elates the mind, even of the meaneſt peaſant, vibrates with ardour and pants to ſpring forth the guardian of thoſe principles, which emanate from the boſom of God!—The protector of thoſe laws, which are derived from the immutable decrees of the eternal code, laid down by providence, and delivered to man at the creation!

The moment has ſcarcely paſſed ſince the people of Ireland demanded and acquired the reſtitution of their rights, with arms in their hands.—They have laid down their arms, and their rights are again invaded. Where then are they to find protection? They can only inſure it by a ſtrict and firm adherence to thoſe reſolu-

tions, which you have formed for their political creed. Let the people zealouſly ſupport the doctrines you have promulged; let them not tamely ſit down ſatisfied with the melancholy privilege of complaint; let them prove by their ſpirit in the face of heaven and of the world, that by whatever right Engliſhmen poſſeſs freedom, by the ſame right, Iriſhmen, and all mankind may claim it.

The greateſt and moſt diſtinguiſhing property of mankind is the immortality of his ſoul; and we find the ſtrongeſt evidence of that immortality in the freedom of his mind, which includes the right of declaring all our thoughts! In this free-will, derived from God, originated the liberty of the preſs, that ſacred medium through which every freeman, who poſſeſſes the bleſſing, has a right to declare his opinions on public men, and on public meaſures. Every unneceſſary reſtraint of the preſs, being then a reſtraint of the free will of man, is an act of tyranny. By ſuppreſſing the exerciſe of intellectual liberty, ſlavery has been eſtabliſhed

bliſhed—by giving it fair ſcope freedom has been reſtored. The hiſtories of nations are illuſtrations of this poſition, and recent proofs are to be found in the fears of Spain and Portugal—in the ſpirit of America and France—in the revolutions of Great Baitain and Ireland.

Then let the preſs exert her powers. Notwithſtanding the reſtraints lately laid on her natural vigour, ſhe ſtill retains ſufficient ſtrength to drag before the people thoſe puſillanimous, corrupt, and abdicating culprits, who, deſerting from the ſtandard of freedom, have enliſted with proſtituted mercenaries, and war againſt common ſenſe, and the law of the land.

The preſs ſtill retains ſufficient ability to hunt from their lurking places, and ſcourge into ſhame and repentance, thoſe adulating and degenerate monſters, who point out to every alien plunderer, the ſecret ſprings, the honey, and the treaſures of the land; who have entered into conſpiracies with ſtrangers, againſt its legal owners, and who have

have ſtripped the laborious peaſant, and the induſtrious manufacturer, of their fruits and earnings.

This is the moment to bring about political reformation, for extirpating venality—and the preſs is the moſt effectual means: Was the *conſtitution* ſubverted, and *tyranny* ſeated on her throne, ſurrounded by her ſycophants, her paraſites, her informers, her guards, her aſſaſſins, and her executioners, a free preſs would *reſtore* the one and *overturn* the other.

THE ESSAY.

IT may be objected, that this eſſay is ill-timed; as tending to influence the determination of ſuits now pending; but the objection is erroneous: The queſtions are not of *law* but of *fact*. The determinations lie with *juries* not with *judges*. The inquiries on the trials will be merely, whether the defendant be *guilty* or not *guilty* of the injury laid in the declaration, and if *guilty*, what *damages* the plaintiffs have ſuſtained. The arguing *points of law* is at all times legal, and the points herein diſcuſſed, are in every reſpect irrelevant to the merits of the iſſues which the juries are to try. Any man as *amicus curiæ* may inform a judge on a *point of law*, but no man ſhall give information to a jury on a fact, unleſs he be a witneſs previouſly ſworn. Earl Mansfield ſome years ago prohibited the publication of evidence given againſt

againſt priſoners on examinations before juſtices of the peace, becauſe the evidence being exparte, the publiſhing of it tended to create an influence againſt the priſoner, which might be injurious to him on trial; but no judge ever yet aſſerted that animadverting on matters of law was illegal, and yet in the caſe of general warrants, the preſs teemed with legal diſquiſitions.

The cauſes for promulging the law of the land, on the diſcretion of judges in granting fiats, and on bail, having originated in the ſuits carried on againſt Magee, the printer, it will be frequently neceſſary to advert to them. In doing this, however, it is not intended to ſtigmatize with invective, or ſevere imputations, the proſecutors or plaintiffs. The law gives a remedy for every injury, and if they ſuffered, or imagined they ſuffered wrong, they had an unqueſtionable right to ſeek redreſs from the laws of their country.

Magee, conſidered as a private individual, is equally an object of indifference. This

eſſay

eſſay neither takes into conſideration his guilt, nor his innocence, that is the province of a jury; but the proceedings againſt him, are of the moſt ſerious concern to the people; every individual, of whom are entitled to inquire, whether his own rights and liberties have been attacked in the perſon of his fellow citizen, under the ſanction of a proceſs, iſſuing from a court of law, which, by its inſtitution, is the guardian and protector of thoſe rights and liberties.

The honour of the laws of Ireland, its judges, and its profeſſors, is alſo materially involved in the ultimate deciſion upon theſe proceedings. The Engliſh bar have treated them with contempt and reprobation. It is at this day a common obſervation in Weſtminſter-Hall, that "Ireland will ſoon repent the loſs of writs of error and appeal to the courts of England." Muſt not the pride and ſenſibility of Iriſhmen, ſuffer to the quick from the fallacious ſlander, thus indiſcriminately thrown upon all the judges, and all the barriſters of this king-

dom

dom? And muſt not theſe ſufferings be aggravated in the minds of thoſe who know, that unſullied purity, extenſive knowledge and great ability, have ever been found at the Iriſh bar? That the bench is radiated by ſacred worth, ſpirit, and independence? That the law is promulged by judges of inflexible integrity, united with intelligent minds, fortified by invincible virtue, and diſpiſing with eqtal contempt thoſe accommodating fears, which ſometimes give temporary popularity, and thoſe mean pliabilities, which bow and cringe with implicit obedience, to the influence of every adminiſtration?

Under the torture of thoſe ſufferings, the writer of this eſſay with ſedulous attention, ſearched the records and repoſitories of the law, for precedent or principle, upon which he could juſtify, excuſe, or even palliate thoſe proceedings, thus reprobated in England.

What was the conſequence?

He

He found that the opinions of the Engliſh lawyers, ſo far as they reſpected arreſts by fiat, in caſes of libels, were well grounded; and, to his great ſatisfaction, he is now convinced that the Iriſh bar, and every independent member of the Iriſh houſe of commons, maintain the ſame doctrine, and have thereby vindicated the juriſprudence of their country, and the ancient practice of their courts from wanton and raſh aſperſions.

Theſe extraordinary proceedings, thus univerſally condemned, of courſe appeared to him as raſh and alarming innovations on the indubitable rights of the people. They appeared to him as grievances, ſpringing from latent motives, and tending either to oppreſs private individuals, or to eſtabliſh precedents for the purpoſe of coercing the liberty of the preſs, an object that has been repeatedly attempted, and too often with ſucceſs, ſince Mr. Pitt has been placed at the head of the Britiſh adminiſtration, though no miniſter was ever ſupported by a more licentious abuſe of his opponents.

The Caſe of MAGEE, *is this,*

He has been arreſted on fiats, or judges warrants, and held to ſpecial bail in ſeveral actions, brought againſt him for publiſhing libels on private individuals; and he has been held to bail in the following ſums—four thouſand pounds—eight hundred pounds—one thouſand pounds—and two thouſand pounds, making in the whole, the ſum of ſeven thouſand eight hundred pounds.

Now as each bondſman muſt ſwear himſelf, when juſtifying his bail, worth double the ſum for which he becomes bound, the bail demanded amounts to thirty-one thouſand two hundred pounds! and this unfortunate defendant is a private ſubject—the printer of a newſpaper!

Two queſtions reſult from this caſe:

FIRST—*Were the arreſts legal?*

SECOND

SECOND—*If the arreſts were legal—was the ſpecial bail demanded of the defendant legal?*

In anſwer to theſe queſtions it has been aſſerted—

That the right of granting a fiat is within the *diſcretionary power* of the judge: And,

That the *quantum* of bail demanded is within the ſame *diſcretionary power.*

It is therefore the purport of this eſſay to ſhew, that the charges exhibited againſt the defendant being for libels, and the objects of the imputed calumnies private individuals, the interference of a judge, by fiat, in ſuch caſes, is *unprecedented*, the ſpecial bail demanded of the defendant *exceſſive*; that neither of thoſe acts of the judge are within the rules of *legal diſcretion*, and that they are both *contrary to the* LAW OF THE LAND.

The granting of fiats, in any caſe, being diſcretionary, the firſt point to be diſcuſſed, is

is the nature, and legal extent of that power.

LORD COKE defines *diſcretion* thus—It is, ſays that learned juriſt, to diſcern between right and wrong, ſhadows and ſubſtance, equity and colourable gloſſes, and not to do according to our *will* and private *affections*; and ſuch diſcretion is to be *limitted* and *bounded*.

2 Inſt. 56. Therefore, whoever hath power to act at *diſcretion* is bound by the rule of *reaſon* and law. For *juſtices* muſt remember that it is a *legal diſcretion*, in which, in *favour of liberty*, great *tenderneſs* is to be uſed,—And though there be a latitude of diſcretion given to one, yet he is *circumſcribed* that what he does be *neceſſary* and *convenient*, without which no liberty, no claim to juriſdiction can defend it.

2 Inſt. 298.

Hob. 158.

For theſe reaſons when the law leaves any thing, to any perſon, to be done according to his *diſcretion*, the law intends it muſt be done with *ſound diſcretion* and *according to law*.

1 Lil. ab. 477.

law. And the COURT OF KING'S BENCH hath a power to redreſs things that are otherwiſe done, notwithſtanding that they are left to the *diſcretion* of thoſe who do them.

The ſuperintending power which the conſtitution thus repoſes in the court of king's bench, does not, however, authoriſe the judges of that court to exerciſe an *uncontrolled diſcretion* over the perſonal liberty of the ſubject. The reſtrictive rules of *legal diſcretion*, are as binding on the chief-juſtice and his brethren, whether acting collectively, or individually as on any ſubordinate magiſtrate; they are as ſtrictly binding on judges in courts of law, as principles and precedents are binding on the chancellor, or the barons of the exchequer in the courts of equity.

If *diſcretion* was not thus circumſcribed the ſubject, ſays Lord Coke, would feel it a *crooked line, ruinous to the* perſonal liberties of the people; whoſe liberties or rights have never been abridged, by the laws of England, without ſufficient cauſe, and can not

1 Inſt. 1 Black. 134. Mont. S. L. b. 11. c. 5.

not ever be abridged, at the mere *diſcretion* of the magiſtrate, without explicit permiſſion from the laws.

1 Black. 6. The reaſon of this doctrine is obvious. Civil liberty which is the very end and ſcope of the Engliſh conſtitution, rightly underſtood, conſiſts in the power of doing whatever the laws permit; which is only to be effected by a general conformity of all orders and degrees, to thoſe equitable rules Inſt. 1. 3. 1. of action, by which the *meaneſt individual*, is protected from the inſults and oppreſſion of the greateſt. If this was not the caſe there would be no liberty. For as Smith in his Commonwealth of England obſerves, ſpeaking of a court of equity, there is as much difference between the *conſciences* of men, or their *diſcretion*, as between the meaſure of their feet; and as one man may have a longer or ſhorter foot than another man, ſo may his *conſcience* or diſcretion be more contracted or extenſive.

If the perſonal liberty of the ſubject was not thus protected by the law; if the higheſt magiſtrate,

magiſtrate, the KING himſelf, was not thus reſtricted in the exerciſe of *diſcretion*, weak, or corrupt judges, influenced by caprice, by reſentment, by party prejudice, or by obſtinate ignorance might, under pretence of legal authority, exerciſe an *arbitrary power*. The fiat or warrant would attack the perſon of the deſtined victim—The demand of enormous bail would ſend him to priſon, where his ſufferings being unknown to the public, or if known, being ſoon forgotten, inevitable ruin, to himſelf and family, would be the conſequence. Impriſonment is the leaſt public, the leaſt ſtriking ſpecies of puniſhment. *Arbitrary* power of inflicting it, is the moſt dangerous engine that could be put into the hands of a man inclined to injure the rights of the people. Therefore, the common law has wiſely provided againſt it, by the writ of *habeas corpus*, which by a declaratory enacting and penal ſtatute, has been made one of the great bulwarks of the peoples' liberties.

Happy is it for the ſubjects of the Britiſh and Iriſh crowns, that *judicial diſcretion* is thus cir-

cumſcribed within the bounds of reaſon, and controled by the rules of law. Men of the moſt conſummate knowledge and unbiaſſed probity, are ſtill men. Be their judgments ever ſo acute, their hearts ever ſo uncorrupt, yet even too exquiſite a ſenſibility of nature may in ſome caſes miſguide the one and pervert the other. Affection and prejudice operate ſtrongly in perſons of lively ſenſations and urge them often to be unjuſt in thoſe very inſtances wherein they flatter themſelves they are only generous. Rare are thoſe talents which conſtitute a great judicial character. It requires a ready and clear apprehenſion; a ſound, diſtinguiſhing and exact act judgment; a comprehenſive underſtanding; freedom and liberality of thought; ſagacity to inveſtigate the great principles of juſtice; and diſcernment to ſee where thoſe principles lead.—BACON was the wiſeſt chancellor ever ſat in a court of equity: JEFFERIES was a moſt excellent lawyer; but the one was corrupt, and the other was cruel. Had theſe men been ignorant, would their oppreſſions have been leſs?

Having

Having ſhown the nature and legal extent of diſcretionary power in judges the next point is,

Were the *arreſts*, in the ſeveral ſuits againſt Magee for publiſhing libels, legal?

The granting of a fiat, or judges warrant to hold a defendant to bail, is a truſt repoſed in the judges, to be exerciſed only on extraordinary caſes of neceſſity; and in what ever caſe they are granted, the greateſt delicacy, circumſpection and precaution ſhould be attended to.

A fiat ſhould never be granted in any caſe, but on poſitive affidavit, ſtating ſpecial circumſtances of actual loſs, of mayhem, of battery, or that the defendant is going to quit the kingdom. If a perſon has dangerouſly wounded another, the juſtice ought to be very cautious how he takes bail, till the year and day be paſt; becauſe the defendant is liable to an indictment for murder, if the wounded party die within a year and day; and the ſame reaſon ſhews the

2 Inſt. 186.

the neceſſity of granting a warrant to apprehend the delinquent; beſides in caſes of actions for mayhem, or violent battery, the wounds and the blows are poſſitive proofs of *actual injury*, and a breach of the peace. The aggreſſor is therefore held to bail not only to anſwer the damages, but to prevent his flight from juſtice.

When a fiat is applied for on a poſitive affidavit that the defendant is going to leave the kingdom, and the proof of ſuch fact is accompanied with the further proof of ſpecific damages, a fiat is neceſſary to render ſuch defendant ameanable to juſtice, and the conſequences of the ſuit. It is more expeditibuſly procured than the writ *ne exeat regno*, which may be granted, in any caſe, where there is danger of ſubterfuge from the juſtice of the nation though of private concernment.

2 Chanc. Caſ. 245.

The law, or rather the diſcretionary power which ſhould rule, the conduct of the judge, in granting a *ne exeat regno*, applies ſtrictly

to

to the exerciſe of *legal diſcretion* in granting a *fiat*.

LORD CHIEF JUSTICE HOLT ſays, a *ne exeat regno* ought not to be granted, but upon great reaſon and examination, otherwiſe a *homine replegiando* may lie. 2 Chanc. Caſ. 245. Farr. 9.

In the application for the writ *ne exeat regno*, which is a prerogative or ſtate writ, no *general averment*, though upon *oath* will be held ſufficient.

The plaintiff applying for a *ne exeat regno*, is to make poſitive oath of his *debt*, and the writ is always marked for the ſum ſworn in the affidavit, in words at length and not in figures, and the plaintiff ſwears the defendant is *going out of the kingdom*, which if he ſhould do the *debt* may be loſt. The order is till anſwer, or further order, and the party is obliged to give ſecurity before the court will diſcharge the writ, which ſecurity is taken by recognizance before a maſter, and is in the penalty of what is ſworn to be *actually* due and the ſheriff takes bail accordingly, Skinn. 136. Chanc. C. 115. 7 Mod. 9. Ld. Ray. 696. Caſ. in B. R. 562.

when

Stiles 441. —442. when he arreſts the party thereon, the ſum ſworn to be due being conſtantly endorſed on the *ne exeat regno* as a guide for the ſheriff to take bail by.

From a comparative view of the writ of *ne exeat regno* with a *judges fiat*, it appears then, that in granting the latter, the judge ſhould conſider and ſtrictly adhere to the legal rules of *diſcretion* which are ſtrictly followed in granting the former.

The *reaſons* for granting a fiat ſhould be equally ſtrong. The facts ſtated in the affidavit ſhould be equally ſpecific, and the ſituation of the plaintiff, his *credibility*, and his cauſe of action, ſhould equally entitle him to this extraordinary interference and favour of the judge.

Thus in Hilary 1787, in the common pleas of England, an application was made to Mr. Juſtice Gould to hold a defendant to bail, on a breach of promiſe of marriage. The affidavit ſtated the cauſe of action, that defendant (a lady) was going to quit the kingdom,

dom, and that plaintiff had ſuffered five hundred pounds damages. The judge held this affidavit inſufficient, becauſe plaintiff did not ſpecifically ſtate the cauſe or cauſes by which the damages accrued, but gave him leave to amend. He then ſwore, that at the particular requeſt of the defendant, he ſold his commiſſion for five hundred pounds, and ſpent the money on her, ſhe having poſitively promiſed him marriage, and to purchaſe him a commiſſion of higher rank, and on this affidavit ſhe was held to bail.

No man will be ſo weak or ſo raſh as to aſſert that the ſame caution and preciſſion is not neceſſary in granting a *warrant* at the *diſcretion* of a judge, that the law requires in iſſuing a *prerogative writ*. The latter is a royal truſt repoſed in the king, which the law does not preſume that he will abuſe, or make uſe of to the prejudice of his ſubjects. The former is a delegated truſt from the king to his repreſentative, the judge, who is ſworn to execute it according to law, and who is reſponſible to parliament for his conduct.

F. N. B. 95. Lane 29. 2 Co. 17. C. 76. 10 Co. 92.

Having

Having examined the nature and legal extent of *diſcretionary power*, the next object is,

Whether a defendant can be held to bail for publiſhing a libel? againſt a private individual.

Magna Charta enacts, that no man ſhall be impriſoned but by judgment of his peers, or by the law of the land. The impriſonment of Magee has not been by the judgment of his peers. Has it been by the law of the land? The anſwer is, there is neither law nor practice to ſupport ſuch a proceeding; for the diſcretion exerciſed, is not within the rules of "ſound reaſon, law, neceſſity, and convenience."

The definition of a libel ſhows, that it is not an offence, for which a defendant ſhould be held to bail, even on a criminal action.

A libel

A libel is a *miſdemeanor*, and is eſteemed as ſuch, not for being a *breach* of the peace, but for its direct *tendency* to a breach of the peace by provoking to fight. Now, the law of England never intended, that the ſubject ſhould be held to bail for any miſdemeanor, that did not amount to an actual *breach of the peace;* and formerly none could be taken up for a miſdemeanor till indictment found. Therefore, mere words of paſſion, as liar, knave, or raſcal, do not create a *forfeiture of recognizance* to keep the peace, for they do not challenge a man to *break* the peace, though they *tend* to it; from which the reaſonable concluſion is, that as *ſlander* does not incur a forfeiture of recognizance for keeping the peace, neither is it an offence that can juſtify a judge, in holding a defendant to bail.

6 Mod. 178. Regina v. Tracy. 1 Haw. 130.

It may be anſwered, that, though bail is not demandable in a criminal proſecution for a libel, againſt a private individual, yet the plaintiff may demand it in a civil ſuit.

Thoſe

Thoſe who thus argue, are called upon to ſhew a precedent, for holding a defendant to bail on any action for a libel, except in caſes of *ſcandalum magnatum*, or ſlander of title. To make a plaintiff aſſeſſor of his own damages, conceived perhaps in a moment of heat or reſentment would be, to eſtabliſh the groſſeſt miſchief. Damages cannot be aſcertained but by verdict of a jury on hearing evidence, and in many caſes verdicts have been ſet aſide for exceſs of damages. Perjury and oppreſſion would be among the conſequences. It would be deciding by anticipation on the quantum of damages, which the jury ſhould give, and on the oath of the plaintiff himſelf. It would be contrary to natural juſtice, and the liberty of the ſubject, by enabling an inhuman plaintiff to impriſon a poor friendleſs defendant, upon an averment, for the ſpace of three terms, when upon trial it might appear that he was not guilty of the fact, or that what he publiſhed was not actionable. It would be uſeleſs as well as cruel, for thus puniſhing before conviction by fiat, when accompanied by exceſſive bail,

would

would be only a ſeverity known in thoſe countries, where private informers are encouraged to proſecute men obnoxious to the ſtate, and where torture precedes trial.

The following cauſes lately tried at Weſtminſter, are ſo many proofs, that it is not the practice of the courts there, to grant warrants either in criminal or civil ſuits brought upon libel.

Theſe cauſes were——

An information *ex officio*, by the *Attorney General*, againſt *Lord George Gordon*, for a libel againſt the *Queen of France*.

The King, on the proſecution of the *Prince of Wales*, againſt *Walter*. Indictment.

The King, on the proſecution of the *Duke of York*, againſt *Walter*. Indictment.

The King, on the proſecution of the *Duke of Clarence*, againſt *Walter*. Indictment.

Doctor

Doctor Walcot, againſt *Walter*. An action.

Lord Loughborough, againſt *Walter*. Two actions.

Right Hon. William Pitt, againſt *Perryman*. An action.

The Attorney General, againſt *Perryman*. Information ex officio.

The King on the proſecution of Mrs. *Fitzherbert*, againſt *Doctor Withers*. Indictment.

The Attorney General, againſt *Almon*. Information ex officio.

The Attorney General, againſt *Stockdale*. Information by order of the King on addreſs of the houſe of commons.

The libels in all the above cauſes, (except the laſt), were of the moſt atrocious nature. Among the proſecutors and plaintiffs are ſeen the

the moſt illuſtrious characters. A queen, three princes, a lord chief juſtice and a doctor of laws. Walter and Withers were convicted and ſeverely puniſhed. Lord Loughborough and Mr. Pitt recovered damages. Perryman and Almon fled and were proceeded againſt by outlawry; yet, in none of theſe proſecutions and ſuits, which *all* originated within the laſt two years, was a defendant held to bail, or a fiat even demanded.

The above caſes are proofs ſufficient to ſhew that on proſecution and actions for libels, it is not the practice of the court of King's Bench of England to iſſue ſuch proceſs: and it follows that ſuch practice can not be legal here; for practice muſt be conſiſtent with law, and the common law of England, is by the aſſent and adoption of the people of Ireland, the common law of Ireland.

Can it be ſhewn that EARL MANSFIELD, a prerogative judge, who extended the law of libels to its utmoſt ſtretch, ever granted a fiat in the caſe of a libel? Certainly not; his lordſhip well knew it was not within his

his *judicial diſcretion;* he well knew there was neither law nor practice to juſtify the iſſuing of ſuch a proceſs, in ſuch a caſe. To all thoſe therefore who argue in ſupport of the legal authority to hold defendants to bail for publiſhing libels, may be applied Earl Cambden's requiſition to the noble lord above mentioned, who in arguing the writ of error brought on the judgment in the King's Bench on literary property ſaid—" *Shew me a caſe.*"

But ſuppoſing a few caſes ſhould be ſhewn in ſupport of practice, does it follow that the fiats recently iſſued againſt Magee are legal? Practice, like cuſtom, if contrary to law cannot be ſanctified by repetition or continuance. General warrants were in practice from the revolution down to the 6th of the preſent king, when after being ſolemnly argued in the court of Common Pleas and King's Bench, they were declared illegal.

" The practice of a *particular magiſtrate* cannot controul the law. *Communis error* is

is not in this caſe ſufficient to make law. This is the *duty* and therefore doubtleſs the *inclination* of the court to ſtop the miſchief as ſoon as it is complained of."— Caſe of General Warrants

Theſe were the words of Dunning a great conſtitutional lawyer, and they made a proper impreſſion upon the court: for in the ſame caſe Lord Mansfield ſaid, "a *uſage* to grow into law ought to be a general uſage, *communiter uſitata et approbata*; and which after a long continuance it would be miſchievous to overturn: and, Mr. Juſtice Aſton added, "*No degree of antiquity* can give ſanction to a uſage bad in itſelf." 3 Burr. 1762. Money et al verſus Leach. 3 Burr. 1762.

It may alſo be advanced, that if the judges had not authority to hold libellers to bail, juſtice would be evaded and delinquents eſcape with impunity. But is that the caſe? If the defendant flies, proceſs of outlawry iſſues againſt him, and the voluntary tranſportation of his perſon by flight is a ſeverer puniſhment in the eye of the

law, than any the *judicial diſcretion* of the court can inflict; reſtricted as it now is, by the benign prohibition of the bill of rights, which declares that, by the common law of the land, which protects the ancient rights and liberties of the people, exceſſive bail ought not to be required, nor exceſſive fines impoſed, nor cruel and unuſual puniſhments inflicted.

Stat. 1. W. & M. c. 2. Bollingb. abridgm. tit. Liberty.

The refuſing of bail where it ought to be granted, that is in the language of the old law, "to withold priſoners repleviable after they have offered ſufficient bail," is an offence at common law and by ſtatute puniſhable by *grievous amercement*; and demanding bail, where it is not demandable, muſt of courſe appear an offence of equal magnitude, as in each caſe the liberty of the ſubject is invaded. On this legal doctrine much might be ſaid—but delicacy forbids the argument;—the opinion of Dunning before ſtated, will probably be followed—"It is the *duty* and therefore doubtleſs the *inclination* of the court to ſtop the *miſ-*

1 New. ab. 228. 2 Inſt. 191. Hal. p. c. 97. Stat. Weſt. 1. 3 Edw. 3. c. 15.

pa. 36.

3 Burr. 1752.

chief

chief (*of fiats*) as ſoon as it is complained of."

Magna Charta has been mentioned and many other old ſtatutes are equally applicable. By the 25. of Edward 3. Stat. 5. c. 4. it is enacted that none ſhall be taken by *petition* or *ſuggeſtion* to the king or his counſel unleſs it be by *indictment* of lawful people of the neighbourhood, or by proceſs made by *original writ* at the common law. Clear it is that a *fiat* is not an *original writ*, and it is equally clear, that an averment on oath, or general affidavit is merely a *ſuggeſtion* to the king or to his judge and repreſentative, and of courſe, that to *take* or impriſon a man on ſuch affidavit is illegal. Theſe are old ſtatutes, but they are living ones; the law, though it ſleeps, never dies; and acquires reſpect and reverence from antiquity. 28 Ed. 3. c. 3. 48 Ed. 3. c. 3.

Bishop's Case, though not ſtrictly in point, is not irrelevant to this argument.

Biſhop was held to bail in the ſum of two thouſand pounds, and two ſureties of two thonſand pounds each. But mark the difference between the caſes of Biſhop and Magee. Magee has been held to bail before trial in large ſums, for publiſhing libels againſt obſcure individuals. Biſhop was not held to bail till after conviction, on an information, for publiſhing a ſeditious libel againſt the ſtate. Biſhop was not held to bail, on an averment or ſuggeſtion to a judge. Magee has been held to bail on looſe affidavits, to anſwer damages eſtimated by the plaintiffs themſelves. Biſhop was held to bail, to ſuffer the judgment of the court; he was committed after conviction of courſe, and being afterwards brought up, it was moved, he ſhould receive the judgment of the court, and be admitted to bail, being in a very ill ſtate of health. The chief juſtice ſaid, the offence is ſo great, that an adequate puniſhment may endanger his life, and to leſſen the puniſhment will be an ill precedent; therefore bail him for the preſent, and we will give judgment when he is better.

1 Strange 9.

1 Strange 9.

This

This was adminiſtering juſtice in mercy.

In England it is enacted, by a ſtatute to prevent frivolous and vexatious ſuits, "that in all caſes, where the cauſe of action ſhall amount to the ſum of ten pounds, affidavit ſhall be made, and filed of the cauſe of action, and the ſum or ſums ſpecified in ſuch affidavit, ſhall be endorſed on the back of ſuch writ or proceſs, for which ſum or ſums ſo endorſed, the ſheriff or other officer to whom ſuch writ or proceſs ſhall be directed, ſhall take bail, and for no more." Stat. 12 Geo. 1. c. 29.

This ſtatute, though not of legal authority in this country yet being founded upon reaſons and principles of the common law, may be fairly cited in argument, as may the caſes reſulting from it.

By theſe caſes, and ſeveral of anterior date, it is now an eſtabliſhed rule, of the courts at Weſtminſter, that where the affidavit of the debt does not poſitively ſhew the cauſe of action, and ſpecify the ſum due, the defendant ſhall be diſcharged on Barnes 100, 105, 109. Strange 1157, 1209, 1219, 1226. 1 Wilſ. 121, 231.

2. Burr. 625. where a great number of cases are cited. 5 Burr. 1447.

common bail, which is no more than filing as ſureties the names of thoſe well-known non-entities, Meſſrs John Doe and Richard Roe. Indeed ſo tenacious was the old law of the perſonal liberty of the ſubject, and ſo cautious was it to diſcourage litigation, that formerly, before a plaintiff could obtain a writ to hold a defendant to bail, he was obliged to put in two ſureties, that if he was nonſuit, or a verdict given againſt him, he would pay the defendant's coſts and damages. but this precaution has become obſolete, and John Doe and Richard Roe, who repreſent common bail in all caſes, are now alſo become the nominal and fictitious pledges to proſecute.

Where damages are *uncertain*, common bail is always taken, and there are many caſes to this point.

Barnes 108.

In *Reynoldſon* v. *Blades*, [for covenant broken, (in the treaſury) the court ſaid, where damages can be reduced to a certainty, as in covenant for payment of money, or where a tenant covenants with his

his landlord to pay a certain ſum for every acre of land he plows up, or the like, plaintiff is entitled to bail, otherwiſe not, for it is not reaſonable that defendant ſhould be held to bail for ſuch *damages* as plaintiff *fancies* he has ſuſtained, and is *pleaſed to ſwear to!*

In the above caſe it was alſo held, that the old caſes, Fleetwood, *v.* Poictier, &c. are not to be followed. Barnes 67.

Shaw brought an action of debt againſt Hawkins on a bond, wherein defendant was held to bail on plaintiff's affidavit. Defendant moved for a common appearance, and that plaintiff might produce the bond to the court upon an affidavit, that, defendant had great reaſon to believe, that the whole ſum due was paid by one of his co-obligers, which would appear by endorſement made on the ſaid bond when produced. Plaintiff in anſwer made affidavit, that a hundred pounds and upwards remained due to him on the bond after all juſt allowances; that he had ſeen the Shaw againſt Hawkins. Barnes notes 72.

bond

bond which was uncancelled, and in full force ſome few months before, but had miſlaid it, and being ſeverely afflicted with the gout, could not ſearch among his papers himſelf, ſo that it could not be procured. It was urged by the plaintiff, that no declaration being yet delivered, defendant is not intitled to *oyer* of the bond, but, after a declaration, with a *profert in cur*, he was intitled to *oyer*. The court held, that as the matter of bail is *diſcretionary*, and as the meaſure of the ſum, for which bail ought to be given, is with *certainty* only to be had from the bond itſelf, the bond ought to be produced, and for want of producing it, a *common appearance* was ordered.

Where the queſtion was, whether the condition of a bond not appearing upon record, bail ought to be required in a court of error. The court held that matter of bail, is properly examinable by affidavit, and the bonds being conditioned for performance of covenants, bail ought not to be required on a writ of error.

Spinks v. Bird. Barnes 72. 95.

Plaintiff

Plaintiff made an affidavit, that defendant had ſeized, and detained his ſhip to his damage, and *a capias ad reſpondendum* was thereupon endorſed for all without a judge's order. Rule for common appearance and *ſuperſedeas* was made abſolute; the damages in this caſe are *uncertain*, and plaintiff was not intitled to bail without a judge's order. In *debt*, *aſſumpſit*, *trover*, *covenant* by *aliam*, bail is of courſe in *treſpaſs*, *detinue*, in *ſpecial action on the caſe*, or in *covenant at diſcretion*; for WORDS *no* bail, unleſs ſlander of title.

Le Wint v. Tolchet. Barnes 79. 1 Com. Dig. 507. 1 Siderfin 183. Compton 29, tit Bail.

The foregoing caſes, will all apply as ſtrongly in elucidation of the ſubſequent part of this eſſay, as they have in ſupporting the anterior argument.—But if there was not a caſe or ſtatute in point, the queſtion on *fiats* could be decided upon *principles*.

It is a principle that no man ſhall be impriſoned but by the judgment of his peers or the law of the land—Now the law of the land will not hold a man to bail for *ſlanderous words*—

Magna Charta.

and

and where the law holds a man to bail, it muſt be for a *ſum ſpecifically ſworn to*, and the law of the land forbids that bail to be *exceſſive*. But if the proceedings in the ſuits againſt Magee, were not prohibited by any poſitive law, nor adjudged illegal by any precedents, yet they might be decided to be ſo upon *principles*, and the law of England would be a ſtrange ſcience indeed if it were decided upon *precedent* only. Precedents ſerve to illuſtrate principles and to give them a fixed certainty; but the common law, which is every man's birth-right, is excluſive of poſſitive law enacted by ſtatute, and depends upon principles. Cowper. 39.

Having ſhewn, that in actions for *ſlander*, neither the law of the land, nor the practice of the courts juſtify judges, in holding defendants to bail.

The next queſtion is:

Suppſiong a judge, or a court of juſtice, to poſſeſs diſcretionary power to hold a defendant to bail on proſecutions, or ſuits for libels,

libels, was the bail in which Magee was held, within the rules of that *diſcretion* and authorized by the law of the land; or was it what the law terms *exceſſive?*

DALTON and BACON define bail, to be an *undertaking* of a *man's friends*, before certain perſons, for that purpoſe authorized, that he ſhall appear at a certain day, and place certain, and anſwer any legal charges exhibited againſt him. Dalt. 166. 1 New. ab. 205.

This definition is grounded on that given by Bracton. Bail, ballium (from the French bailler, which comes from the Greek, βάλλω, and ſignifies to deliver into hands) is uſed in our common law, for *freeing*, or *ſetting at liberty*, one *arreſted*, or *impriſoned*, upon any action, either *civil* or *criminal*, on ſurety taken for his appearance, at a day and place certain. Lib. 3. Tract. 2. ca. 8. nu. 8. 9.

The reaſon why it is called *bail* is, becauſe by this means in the caſe of civil actions, the party reſtrained, is delivered into the hands of thoſe, who bind themſelves Impey's Practice in B. R. Highmore on Bail.

ſelves for his forth coming, in order to a *ſafe keeping, or protection from priſon*, and the end of bail in a civil action, is to ſatisfy the condemnation and coſts, or to render the defendant to priſon.

See the caſes already cited.

In all civil actions, whereon bail may be taken, there ſhall be a poſitive affidavit of the cauſe of action, and no *averment* of damages is ſufficient, though on oath, to hold a defendant to bail. If a judge, will however take upon him to exceed his *judicial diſcretion*, and hold a defendant to bail, upon an averment of damages, whereby he allows the plaintiff to aſſeſs his own ſatisfaction, which is clearly the excluſive right of a jury, he ſhould take care, that the eſtimate of the plaintiff be not ſo *high* as to *impriſon* the defendant, but ſo *low* as not to prohibit what the law allows him, "*protection from priſon*;" for this would be tantamount to *withholding* of bail.

In criminal caſes, bail is not only the means of *giving liberty* to the priſoner, but at

at the ſame time, ſecures the extent of the law to puniſh an offender, and as it is the *undertaking of a man's friends*, for the purpoſe of his appearing to take his trial, or be dealt with according to law.; therefore, bail demanded at the *diſcretion* of the judge, ſhould always bear a relation to the defendant's ſituation in life, as well as to the offence charged upon him; for ſhould the bail be exceſſive, the defendant is precluded from that "*undertaking of his friends*," which the law allows, "to protect him from priſon, and the judge does not act according to the rules of *law and ſound reaſon*, which are the guides to *judicial diſcretion*.

The law, by which bail is regulated in criminal and civil actions, appears clearly to be founded on the ſame principles, and to have the ſame great object in view, "*the liberty of the ſubject*." It never was intended that a man ſhould be impriſoned for *damages*, till thoſe damages were *aſſeſſed by a jury*, or for an *offence* till *convicted by his country*, unleſs that offence was of ſuch enormity and notoriety, that the four walls of

of a priſon only could be conſidered certain ſecurity, for his perſon.

1 New Ab. 226. Dalt. 14. 2 Hawk. p. c. 88. 89. Hal. p. c. 97.

What is *exceſſive* bail, may eaſily be collected from the eſtabliſhed law of the land. It is ſaid, not to be uſual for the King's-Bench to bail a man on a *habeas corpus*, on a commitment for treaſon or felony, without four ſureties, and the ſum in which the ſureties are to be bound, ought never be leſs than forty pounds for a *capital crime*; and in all felonies there ſhould be two ſureties; but it may be higher in *diſcretion*, on conſideration of the ability and quality of the priſoner, and the nature of the offence.

Now it appears from the above authorities, that if bail is to be taken at all for a libel, which conſidered as an offence, is not a *breach of the peace*, but only a miſdemeanor, *tending* to a breach of it, that the *leaſt* bail, which the law allows in caſes of treaſon and felony, is the *greateſt* that the *diſcretion* of the court can legally demand for

for ſuch a ſpecies of miſdemeanor, particularly where the libel is againſt a private individual, not againſt a peer, or againſt the ſtate.

The bail demanded from Magee in the different actions for ſlander has been ſtated at the enormous ſums of four thouſand pounds, one thouſand pounds, eight hundred pounds, and two thouſand pounds.

Let us ſee if ſuch demands be conſiſtent with the COMMON LAW.

Let us ſee if it be prohited by the STATUTE LAW.

Theſe two points may be examined together.

The COMMON LAW lays it down, that juſtices muſt take care, that under pretence of demanding *ſufficient ſurety*, they do not make ſo *exceſſive a demand*, as in effect to amount to a *denial of bail*. And in ſupport of 2 Hawk. p. c. 89.

of this doctrine, a long ſtring of caſes might be produed, a few however will be ſufficient, as the great principles of bail are to be found in the *petition of rights*, and *the habeas corpus act*. But it is to be obſerved, that in thoſe caſes, even where the offences charged upon the defendant have been enormous, as actions for Mayhem, for violent and cruel batteries, for malicious profecutions, &c. no bail has been demanded, that bears the leaſt proportion to the ſmalleſt ſum demanded from Magee.

Barnes Notes 76. 191.

See the old acts cited in p. 36, 37. Stat. 1. Wm. and Mary c. 2.

The STATUTE LAW, after recognizing the oppreſſions of a tyrannical government, prohibits the demand of exceſſive bail as a *grievance*; and it was one of thoſe complained of by the people, and provided againſt by the legiſlature at the revolution, in the ever memorable bill of rights.

If it be ſaid the bill of rights only reſpects criminal proſecutions; the anſwer is, it is a ſtatute declaratory of the common law, but if it was not, acts of parliament ſhall be taken with *latitude*, and extended

to

to caſes within the ſame *reaſon*, and calling for the *ſame remedy*. The nature of the caſe, and the intent of the legiſlature, are to be conſidered, ſo in the conſtruction of the Engliſh ſtatutes, the 11 and 12 of W. 3. and 12 Geo. 2. c. 49. the court of common pleas held both that as ſtatutes were made in favour of the liberty of the ſubject, they may ſtand together. Now whatever *reaſon* can be ſhewn againſt demanding exceſſive bail on criminal proſecutions, acquires ſtrength when applied againſt ſuch a demand, by the *fiat* of a judge, in a civil ſuit, wherein the damages are undetermined, wherein the cauſe of action may be juſtified, or wherein no damages whatever may be given, but on the contrary a verdict may be found for the plaintiff. To prevent *exceſſive bail* is the *reaſon* on which the prohibitory ſtatutes were founded; civil ſuits were not ſpecified merely becauſe the grievance now complained of was not then known, but they are within the *principle* of the ſtatutes, and of courſe within their *prohibition* and relief.

Barnes 89. Raymer v. Burrough. Plowd. 366. Lord Zouch's caſe. Co. Litt. 24. b. 10 Co. 101. b. Beaufages caſe. Plowd. 147. Iſton v. Studd. Plowd. 36. Platt v. the Sheriffs of London. Brooke tit. Parliament 20. Wentworth's Office of executors 67. Sir Thomas Jones 62. Plomer v. Witchcot.

In England, the principles of theſe ſtatutes have been conſtantly kept alive. LORD MANSFIELD, well knew, that the ſpirited people of that country, were more tenacious of the ſacred privileges of perſon, than of any other right or liberty the conſtitution gives them, and therefore his lordſhip always ſet his face againſt *exceſſive bail*, and againſt *exceſſive damages*.

When MR. LAURENS, the American, was brought before the court of King's-Bench, on a charge of high treaſon, his friends made a voluntary tender of one hundred thouſand pounds bail. Lord Mansfield refuſed to receive ſuch bail, which he termed enormous, and conſidered unconſtitutional, and ordered the recognizance to be made out for ſuch a ſum, as was proportioned to the offence charged upon the priſoner, his rank, and ſituation in life.

The opinion of Mr Attorney General of Ireland (Wolfe) delivered in the houſe of commons, on Mr. Ponſonby's motion, co-incides with that of Lord Mansfield, in the caſe

caſe of Mr. Laurens; That learned gentleman, then declared, "that he did not think a *man's ability to give large bail was a juſtification for demanding it.*"— News paper report of the debate,

In Sir Thomas Rumbold's caſe, a bill was brought into the houſe of commons, by Mr. Henry Dundaſs, then lord advocate of *Scotland*, to reſtrain Sir Thomas from diſpoſing of his property, by holding him to bail, in the ſum of one hundred and fifty thouſand pounds. Parl. Reg. of Eng. 1782. by Debrett.

The *Engliſh* lawyers, were rouzed at this unconſtitutional requiſition of the *Scotch* advocate.—

The Attorney General ſaid, it was a hard caſe to impound a man's whole eſtate merely that he ſhould not fly from juſtice. The demanding of enormous bail he reprobated in the moſt pointed terms, as amounting in reality to abſolute impriſonment; becauſe no man under ſuch a rule of bail, could *indemnify others to become* ſecurity for him. See definition of bail ante.

The

The SOLICITOR GENERAL argued on the ſame points. He inſiſted that the demand was contrary to the *practice of the courts below*; and that to exact exceſſive bail was a breach of the conſtitution. The law condemned ſuch bail as being cruel, by inflicting puniſhment on the innocent—by impriſoning before conviction, men who could procure reaſonable bail to enlarge them till the day of trial.

MR. HASTINGS, impeached for high crimes and miſdemeanors, by the houſe of commons in the name of the people of Great Britain, was only held to ten thouſand pounds bail, though there could be no doubt of his capability to procure bail to any amount.

From what has been advanced then it is clear,

That the *judicial diſcretion* of judges, is circumſcribed and bound by the rules of law and ſound reaſon,

That

That bail can not be demanded on actions for ſlander, except in caſes of ſcandalum magnatum or ſlander of title,

That in all caſes where fiats are grantable there muſt be a poſitive affidavit of the cauſe of action and of the ſpecific damages ſuffered by the defendant,

That the bail demanded in the caſe of Magee was exceſſive, and,

That in civil as well as in criminal actions, a demand of EXCESSIVE BAIL is ILLEGAL.

N. B. The writer of this eſſay was not preſent, at the arguments in the court of King's-Bench, in any of the cauſes againſt Magee; nor was he in the houſe of commons, when the queſtion of fiats and bail came before the repreſentatives of the nation. Of the proceedings in the King's-Bench he has ſeen no report. Of the arguments in the houſe of commons, he has ſeen only a newſpaper account, which however, tho' probably

probably taken down with inaccuracy, and printed in haſte, diſplays great conſtitutional and legal abilities. To avail himſelf of other gentlemens genius and learning, the writer would have conſidered mean and unfair; he has therefore, with every poſſible caution, avoided the introduction of any particular obſervation or expreſſion uſed in the report he has ſeen by the advocates of the people, though in principles it will be found he thinks with them, and the ſtudy of theſe principles of courſe led him to the caſes by which they are illuſtrated.

FINIS.